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May 24, 1993

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**BY HAND**

Ms. Donna R. Searcy  
Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

Re: MM Docket No. 93-25

Dear Ms. Searcy:

Please find enclosed, on behalf of the National Association of Telecommunications Officers and Advisors, et al., an original and nine copies of Comments to be filed in the Commission's proceeding in MM Docket No. 93-25.

Any questions regarding this submission should be referred to the undersigned.

Sincerely,

*William E. Cook, Jr.*  
William E. Cook, Jr.

Enclosures

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Before the  
FEDERAL COMMUNICATIONS COMMISSION

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### SUMMARY

In enacting the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), Congress stated that its policy objective was, in

order to promote a diversity of views and information

Consistent with its mandate under Section 335, the Commission should require DBS services to make available channel capacity for localized noncommercial video and non-video programming of interest to subscribers residing, depending on the technical capability of DBS service, in a locality, state or region. DBS services also should be required to use a portion of their gross revenues to fund such local programming activities, and should provide local noncommercial educational or informational programmers free access to channel capacity reserved for such programming. The Commission also should explore the extent to which DBS services should be required to interconnect with other multichannel video programming distributors, and to make available interactive technology so that subscribers may use DBS services to do home banking, home shopping and other activities in the public interest. Such interconnection and interactive obligations would lay the foundation for DBS services to become part of the national "informational superhighway" that the Administration seeks to promote.

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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MAY 24 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

Implementation of Section 25 of )  
the Cable Television Consumer )  
Protection and Competition )  
Act of 1992 )

MM Docket No. 93-25

Direct Broadcast Satellite )  
Public Service Obligations )

TO: The Commission

COMMENTS OF THE  
NATIONAL ASSOCIATION OF TELECOMMUNICATIONS  
OFFICERS AND ADVISORS, NATIONAL LEAGUE OF  
CITIES, UNITED STATES CONFERENCE OF MAYORS,  
AND THE NATIONAL ASSOCIATION OF COUNTIES

The National Association of Telecommunications  
Officers and Advisors, the National League of Cities,  
the United States Conference of Mayors, and the National  
Association of Counties (collectively, the "Local  
Governments")<sup>1</sup> hereby submit these comments in the

<sup>1</sup> The National Association of Telecommunications  
Officers and Advisors represents local franchising  
authorities in more than 4,000 local franchise  
jurisdictions, which collectively regulate cable  
television systems that serve an estimated 40 million  
cable subscribers. The National League of Cities  
represents more than 16,000 cities and towns across the  
nation. The U.S. Conference of Mayors represents the  
more than 950 cities with populations exceeding 30,000  
residents. The National Association of Counties  
represents the approximately 2,000 counties across the  
nation.

above-captioned proceeding.

### INTRODUCTION

In enacting the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"),<sup>2</sup> Congress stated that its policy objectives were, in part, to: (1) "promote the availability to the public of a diversity of views and information through cable television and other video distribution media"; and (2) "rely on the marketplace, to the maximum extent feasible, to achieve that availability." Section (2)(b), 1992 Cable Act (emphasis added).

To promote such diversity, Congress enacted provisions, such as Sections 616 (regulation of carriage agreements) and 628 (programming access) of the 1992 Cable Act, to ensure that Direct Broadcast Satellite ("DBS") services (and other competitors to cable operators) obtain access to video programming at fair rates, terms and conditions. However, in addition to ensuring that DBS services have access to satellite-distributed video programming, Congress intended that DBS services also provide a diversity of programming and information in the public interest and enacted Section 25 of the 1992 Cable Act, which is codified at Section

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<sup>2</sup> Pub. L. No. 102-385, 106 Stat. 1460 (1992).

335 of the Communications Act of 1934, to achieve that purpose. 47 U.S.C. § 335. Section 335 instructs the Federal Communications Commission ("Commission") to obligate DBS services to serve the "public interest" in providing video programming. In serving the "public interest," Section 335, among other things, requires the Commission to ensure that its regulations reflect "localism" principles, Section 335(a), and that DBS services set aside channel capacity for "educational or informational" programmers. Section 335(b)(1).

Section 335 ensures that DBS services<sup>3</sup> are subject to "public interest" obligations that are similar to those governing the operations of cable systems. Cable operators are subject, among other things, to: (1) public, educational and governmental access ("PEG") channel, facilities and equipment requirements; (2) leased access channel requirements; (3) franchise fee requirements that ensure that cable operators pay a fair rent for the use of valuable public rights-of-way; (4) rate regulation; and (5) customer service requirements. In addition, cable operators are subject to a franchising process through which

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<sup>3</sup> For purposes of the requirements under Section 335, the Local Governments use the term "DBS service" to include both a direct broadcast satellite service that provides programming and a packager of programming that uses DBS service channel capacity to distribute its programming.



franchising authorities and cable operators can address such issues as: (1) the obligation of cable operators to make state-of-the-art services available to subscribers; (2) general facilities, equipment and service requirements; (3) enforcement mechanisms; and (4) particular local concerns. Such obligations and requirements are designed to ensure that cable operators serve the public interest in cable service and that the public receives the public dividends to which it is entitled from users of valuable public rights-of-way.

It is essential that the Commission use Section 335 to impose similar requirements on DBS services to ensure that such services serve the public interest in video programming and informational services, and that DBS services do not obtain an unfair competitive advantage over cable operators which are subject to public interest requirements -- thus upsetting the competitive balance Congress struck in enacting the 1992 Cable Act. Congress did not intend that the Commission narrowly interpret Section 335 to impose only political broadcasting, and educational and informational access, requirements on DBS services. Instead, Section 335(a) mandates that the Commission initiate a proceeding "to impose public interest or other requirements for providing video programming." This is a broad mandate which the Commission should use to ensure that DBS

services provide a broad range of services and support that benefit the public.

Consistent with this mandate, the Commission should require DBS services to make available channel capacity for local noncommercial programming of interest to subscribers residing, depending on the technical capability of DBS service, in a locality, state or region. DBS services also should be required to use a portion of their gross revenues to fund such local programming activities, and to provide free access to noncommercial programmers that seek to use channel capacity set aside for local programming. The Commission also should explore the extent to which DBS services should be required to interconnect with other multichannel video programming distributors, and to use interactive technology so that subscribers may use DBS services to do home banking, home shopping and other activities in the public interest. Such interconnection and interactive obligations would lay the foundation for DBS services to become part of the national "informational superhighway" that the Administration seeks to promote. These proposed obligations and others are discussed more fully below.

## DISCUSSION

### **1. DBS Services Should Provide Local Programming**

Section 335(a) requires the Commission to enact "public interest or other requirements for providing video programming." In adopting such requirements, Section 335(a) also requires the Commission to "examine the opportunities that the establishment of direct broadcast satellite service provides for the principle of localism under this Act, and the methods by which such principle may be served through technological and other developments in, or regulation of, such service."

Section 335(a), therefore, mandates that the Commission take "localism" concerns into account in establishing DBS public service obligations, and gives the Commission broad authority to impose local video programming and other local requirements on DBS services. Congress did not, as it did in other Sections of the 1992 Cable Act, require the Commission to implement standards reflecting the "localism" principle only if such standards are technologically and economically feasible.<sup>4</sup> Hence, the Commission is

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<sup>4</sup> Compare Section 624A(c)(1)(A) (requiring the Commission to weigh the "costs and benefits to consumers" of equipment compatibility requirements); Section 624A(c)(2)(B)(ii) (requiring the Commission, "to the extent technically and economically feasible," to offer subscribers the option of having certain channels

[Footnote continued on next page]

required by Section 335(a) to adopt local programming and other requirements. The Local Governments strongly disagree with the Commission's conclusion that it may decline to adopt such standards "if a local DBS service is not technically and economically feasible." Notice of Proposed Rulemaking ("NPRM") at ¶ 36. Given the statutory mandate in Section 25, the Commission must adopt local programming requirements. The burden should be on DBS services to demonstrate the technical limits on their ability to meet such requirements.

The statute requires that "localism" concerns be taken into account; it does not define the term "localism." However, it is clear that Congress intended that DBS services provide programming other than programming of nationwide interest. DBS technology will determine how "localized" programming may be. Depending on the technology, the Commission should require DBS services to offer "local" programming to the smallest sub-units of the nation as technically possible. DBS technology will determine whether the smallest sub-units DBS services can serve are, for example, community-specific, statewide or regional. Therefore, DBS technology will determine what the term "local" means

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[Footnote continued from previous page]  
delivered to a television receiver or video cassette recorder without passing through a converter box).

for purposes of local programming requirements, and that term may change as DBS technology evolves.

DBS technology should not prohibit DBS services from offering some form of "local" programming. DBS services simply need to designate an amount of channel capacity for local programming requirements.<sup>5</sup> The DBS service would have the option of allowing all its subscribers to receive such channel capacity, or it could use decoders so that only the subscribers in the area for which the channel capacity is targeted receive it.

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<sup>5</sup> Congress intended that the amount of local programming a DBS service be required to provide be based on its channel capacity and on whether it makes use of channel compression technology. See H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 100 (1992) ("Conference Report") ("[T]he Commission may determine to subject DBS systems with relatively large total channel capacity to a greater reservation requirement than systems with relatively less total capacity"); H.R. Rep. No. 628, 102d Cong., 2d Sess. 124 (1992) ("House Report") ("In determining a DBS system's channel capacity, the Commission may consider the availability of or the use by a DBS operator of compression technologies"). Therefore, the number of hours for local programming, and the size of the geographical area covered for local programming, would depend on the configuration of the DBS service. Also, the areas such local programming might cover would depend on whether the DBS service is capable of providing service to the entire nation, or is capable of serving only a region of the nation. A DBS service that serves the entire nation might be permitted to serve broader geographical areas than a regional DBS service, which might be required to serve smaller geographical areas within its service area.

The Local Governments believe that there are a number of additional "localism" requirements that should be imposed on DBS services to promote subscriber access

would be distributed over the DBS service's local channel capacity.<sup>6</sup> The Local Governments recommend that DBS services set aside five percent of their annual gross revenues for such a purpose.<sup>7</sup> Programmers that wish to provide noncommercial educational or informational programming (defined below) of interest to subscribers in a geographical area should have the right to apply for a grant to help produce such programming.

determine how to allocate airtime on local channel capacity and to distribute grants to programmers in a geographical area served by a local channel.<sup>8</sup> A local DBS access organization might be established by the Commission to serve all DBS services, or each DBS service might be required to establish its own access organization.

Third, the Commission should impose additional non-video local requirements on DBS services. For instance, a DBS service might establish a local information channel which might contain teletext information. Such technology is currently being used, for example, by the Weather Channel so that subscribers in a particular geographical region can read the weather forecast in their region. Once a subscriber turns to the local information channel, it might be presented with an index of regions or localities for which

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<sup>8</sup> The Commission might establish a Committee to: (1) determine how to structure a local DBS access organization; (2) determine methods for selecting programming for local channel capacity that avoids conflicts of interest and the exercise of editorial control by the DBS service; and (3) identify a method for distributing funding for the production of local programming. A similar committee was proposed in the House version of the 1992 Cable Act. See Section 18(a)(5), H.R. 4850, 102d Cong., 2d Sess. (1992). The Commission's Committee should be composed of representatives of, among others, local governments, PEG programmers, public and private educational institutions, DBS services, minority and ethnic groups, and public telecommunications entities.



information is available. The subscriber might use, for example, its remote control unit or telephone to gain access to the information available for a particular region or locality. Noncommercial educational or informational programmers in a particular region or locality that would like to provide teletext information to subscribers in that region or locality could simply send the information to a DBS service's uplink center, which would add the information to the teletext scroll for that region or locality.

Local teletext information also might be used in other ways. For instance, the Commission might require a DBS service to provide an emergency override mechanism. If an emergency occurs in a community, the DBS service could send a signal to the receivers/decoders used to receive DBS service in that region or community. The receivers would then automatically switch subscribers in that community to an emergency service channel on which subscribers could view emergency teletext information or receive an audio message, which might be accompanied by a warning light or alarm.

The above suggestions are just a few of the ways in which the Commission might satisfy the "localism" requirement under Section 335(a). The Local Governments encourage the Commission to consider additional

requirements, and to periodically update its requirements in response to improvements in DBS technology.

**2. The Term "Noncommercial Programming of an Educational or Informational Nature" Should Include National and Local Sources of Such Programming**

Section 335(b)(1) states that the Commission shall require a DBS service to "reserve a portion of its channel capacity, equal to not less than 4 percent nor more than 7 percent, exclusively for noncommercial programming of an educational or informational nature." As the Commission notes in the NPRM, the 1992 Act does not define the term "noncommercial programming of an educational or informational nature." NPRM at ¶ 44.

Section 335(b)(3) clarifies that "national educational programming suppliers" would be an example of such programming. However, Congress did not intend that "national educational programming suppliers" would be the only example of "noncommercial programming of an educational or informational nature." If that had been Congress' intent, then Congress would have used the term "national educational programming suppliers" in Section 335(b)(1), rather than the term "noncommercial programming of an educational or informational nature." Also, Congress required a DBS service to set aside channel capacity for programming of an "educational or

informational nature." Hence, Congress clearly intended that more than just educational programming be made available on such reserved channel capacity.

Moreover, the Conference Committee's description of Section 335 does not indicate that the term "noncommercial programming of an educational or informational nature" should be limited only to "national educational programming suppliers." Conference Report at 100. Instead, the Conference Report's legislative history suggests an expansive reading of the term "noncommercial programming of an educational or informational nature." The Conferees referred to access requirements for "noncommercial programming of an educational or informational nature" in Section 335(b)(1) as access requirements for "public services uses." Id. The House version of Section 335 -- which the Conferees adopted with a few amendments -- defines "public service uses" as: "(1) programming produced by public telecommunications entities, including programming furnished to such entities by independent production services; (2) programming produced by public or private educational institutions or entities for educational, instructional, or cultural purposes; and (3) programming produced by any entity to serve the disparate needs of specific communities of

interest, including linguistically distinct groups, and other groups." House Report at 25.

Hence, the Commission should broadly interpret the term "noncommercial programming of an educational or informational nature" to include at a minimum services meeting the House definition of "public service uses."<sup>9</sup> A national, regional or local programmer that fits within any of these definitional subcategories should be entitled to seek access to a DBS service pursuant to Section 335(b)(1). Moreover, the Commission should permit other sources of noncommercial programming of an educational or informational nature to seek access pursuant to Section 335(b)(1). Such additional sources of educational and informational programming should include, among others, local governments that seek to distribute informational or educational programming.<sup>10</sup>

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<sup>9</sup> The Commission also seeks comments on whether it should determine whether a programmer is a "noncommercial educational or informational" programmer based on the type of entity or on the specific types of programming that such entity may air. NPRM at ¶ 44. The determination of whether a programmer meets the definition of an educational or informational programmer should be based on the type of the entity and the type of programming it generally provides (e.g., 50 percent of such programming meets the definition). The Commission should not require that such programmers demonstrate that each and every program they plan to air is "educational or informational" programming.

<sup>10</sup> In addition, even if the Commission narrowly

3. **The Commission Should Establish  
Free or Reduced Rates for Noncommercial  
Educational and Informational Programmers**

Section 335(b)(1) requires that a DBS service reserve channel capacity for "noncommercial programming of an educational or informational nature," but is silent on whether a DBS service may charge for the use of such capacity. However, Section 335(b)(3) clarifies that a DBS service may set reasonable rates, terms and conditions for access by a national educational programming supplier, and Section 335(b)(4) states that the rate for access by such a supplier may not exceed 50 percent of the DBS service's total direct costs of making such channel capacity available. Hence, except

~~Commercial educational programming suppliers should be~~

Commission should interpret Section 335(b)(1) to mandate that educational or informational programming access be provided for free.<sup>11</sup>

Moreover, a requirement that a DBS service provide free access to educational or informational programmers is necessary to ensure that DBS services and cable operators compete on a level playing field. Cable operators are required by many franchising authorities to provide free access to PEG users. Therefore, it is only fair that DBS services be required to provide free access to a similar class of users.

The Commission need not impose a rate on local educational and informational programmers -- including national educational programming suppliers -- even if the Commission determines that Congress intended Sections 335(b)(3)-(4) to subject national educational programming suppliers and all other educational and

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informational programmers to a rate of up to 50 percent of a DBS service's direct costs of providing channel capacity. Section 335(b)(4) states that the rate may not "exceed" 50 percent of a DBS services' direct costs of providing a channel, but does not require that the rate be set at 50 percent of such costs. Therefore, in order to ensure that the public interest is served and that DBS services compete on an equal basis, the Commission should not impose a rate on any educational or informational programmer, including a national educational programming supplier, for access to channel capacity set aside pursuant to Section 335(b)(1).

If the Commission determines that Sections 335(b)(3)-(4) require that it impose a rate on at least some educational or informational programmers, the Commission should establish a sliding scale of rates with the lowest rate being free access, and the maximum rate being 50 percent of a DBS service's direct costs in

different channel capacity set aside pursuant to Section 335(b)(1).

**4. The Commission Should Impose Video-Related and Non-Video Requirements on DBS Services**

Section 335(a) requires that the Commission impose "public interest or other requirements" on DBS services. The Local Governments strongly disagree with the Commission's conclusion that, for now, the imposition of educational and informational programming access requirements and the Commission's political broadcasting rules on DBS services satisfies its "public interest" obligations under Section 335(a). NPRM at ¶ 29.

DBS services, which may benefit from the programming access provisions in the 1992 Cable Act, also should be obligated to serve the public interest in providing such services. Otherwise, the competitive balance that Congress intended to create by ending the cable monopoly over programming may be upset if DBS services are able to obtain a competitive advantage by avoiding the types of public interest requirements to which cable operators are subject.

The Commission should consider, for example, whether it is in the public interest for DBS services to provide interactive informational services to subscribers, such as home banking and shopping services.



In addition, the Commission should explore whether DBS services should be required to interconnect with other multichannel video programming distributors. For example, the Commission should consider whether DBS services might meet the "localism" requirement under Section 335(a), in part, by retransmitting on local channel capacity PEG programming carried by a cable operator in the geographical area for which the local channel capacity is targeted.

The Commission should further explore these issues in this proceeding, or alternatively, address these issues in a Further Notice of Proposed Rulemaking. In addition, the Commission periodically should review any regulations it adopts in this proceeding to determine the extent that technological advances in DBS technology might enable DBS services to better serve the public interest.

#### CONCLUSION

The Commission should broadly interpret its obligation under Section 335 to ensure that DBS services serve the public interest. A major component of that obligation is to ensure that DBS services provide diverse programming to subscribers, including programming of local interest. The Local Governments urge the Commission to implement the proposals herein to serve